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In the Supreme Court of the United States

OCTOBER TERM, 1967

No. ~~1366~~ 139

SOUTH SHORE PACKING CORPORATION,
Petitioner,

vs.

CITY OF VERMILION,
Respondent.

BRIEF OF THE RESPONDENT, CITY OF VERMILION, IN OPPOSITION TO THE GRANTING OF A WRIT OF CERTIORARI.

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BRIEF OF THE RESPONDENT, CITY OF VERMILION, IN OPPOSITION TO THE GRANTING OF A WRIT OF CERTIORARI.

STATEMENT OF THE CASE.

We shall restate the facts of this case in order to clarify the Statement of the Case in the Petition for a Writ of Certiorari.

The Respondent, City of Vermilion, Ohio, a Charter city under the Ohio Constitution, decided several years ago that a new sewage disposal plant and a revised sanitary sewer system were needed by the city. The existing facilities were old, outmoded, and being operated under a special permit from the Ohio State Department of Health.

In 1961 the city hired R. E. Warner and Associates, an engineering firm, to prepare a comprehensive plan for such a plant and system. This plan was prepared and presented to the City Council in 1962.

After studying the plan the City Council began to take the steps necessary to implement it. Portions of the sewer lines prescribed in the plan have been constructed. Addi-

tional sewer lines are now in the construction and engineering phases.

The largest single project in the plan is the construction of a new sewage disposal plant on a new central site in the city. This new plant will replace three small facilities now in use. In 1964 the city began to purchase the land for the site of the new plant. The city purchased, at private sale, four of the five parcels needed for the site. The petitioner, South Shore Packing Corporation, refused to sell its land. The city followed the procedure prescribed by the Ohio Revised Code to appropriate the petitioner's land. On February 19, 1965, the city filed its legal action in the Common Pleas Court for Erie County, Ohio, to appropriate the land.

On July 21, 1965, the Petitioner filed an action, in the same court, to enjoin the appropriation. At a trial on September 20, 1965, an injunction was denied. Petitioner then appealed to the Sixth District Court of Appeals of Ohio. This court retried the case on July 15, 1966, and denied the injunction. Petitioner then filed an appeal in the Ohio Supreme Court asking for a Motion to Certify the Record and a Right to Appeal on Constitutional Grounds. The court declined to hear the case, and rejected the Petitioner's Motion for a Rehearing. The opinions and decrees of the various courts are correctly set forth in the Petitioner's Petition for a Writ of Certiorari.

In 1965 the Ohio General Assembly enacted a new Chapter to the Ohio Revised Code. This Chapter, Chapter 163, provides a new method for the condemnation and appropriation of real estate. Although adopted in 1965, this Chapter did not go into effect until January 1, 1966, more than ten months after the Respondent's appropriation case was filed and more than three months after the Petitioner's injunction was denied by the Common Pleas Court.

STATEMENT OF THE LAW.

Throughout its entire case the Petitioner has confused two terms that are commonly used in appropriation cases. These terms are "use" and "amount." "Use" is the purpose for which the land is being taken. "Amount" is the geographical extent of the land being taken. Once it is determined that land is being taken for a public "use" then the "amount" of land that is being taken is a legislative question and is not subject to judicial review in the absence of fraud, collusion, bad faith or an abuse of discretion by the appropriating agency.

There is no question that taking land as the site of a sewage disposal plant is taking it for a public use. Such an appropriation is specifically authorized by Section 719.01(J) of the Ohio Revised Code.

In our present case both of the courts that tried the case on its merits determined in their Journal Entries that the land was being taken for a public use, and that there was no evidence of any fraud, bad faith, collusion or an abuse of discretion on the part of the Respondent.

Once this is determined then the amount of the taking is a legislative question, and it is not subject to judicial review.

A very early Ohio case on this is *Iron Railway Company vs. Ironton (City)*, 19 Ohio State 300. In this case the property owner tried to enjoin the city from appropriating certain land. The owner claimed that the land was not needed for a new wharf. The Ohio Supreme Court rejected this contention. The Court said in Syllabus one of its decision:

> "Under the statute authorizing the appropriation of private property for a public wharf by a municipal corporation, the discretion of determining the quantity of ground required for such purpose is vested in

the corporation; and where, in making the appropriation, this discretion has been exercised by the municipal authorities in good faith, their action is final."

The land mark case in the United States on this matter is *Shoemaker vs. United States,* 147 U. S. 282, 13 Supreme Court 361, 37 Lawyers Edition 170. In this case the United States appropriated certain land in Washington, D. C. for use as a public park called Rock Creek Park. The land owner attempted to enjoin the appropriation on the basis that the land was valuable to him and not needed for the park. The United States Supreme Court, in a lengthy opinion, dismissed the landowner's case. The Court said at page 390 of 13 Supreme Court:

"The adjudicated cases likewise establish the proposition that, while the courts have power to determine whether the use for which private property is authorized by the legislature to be taken is in fact a public use, yet, if this question is decided in the affirmative, the judicial function is exhausted: that the extent to which such property shall be taken for such use rests wholly in the legislative discretion, subject only to the restraint that just compensation be made."

The case of *United States of America vs. Agee,* 322 Federal Reporter, Second Series, 139, is similar to our own case. The United States condemned 57 acres as part of a reservoir behind a dam. Only 24 acres would be flooded. The remainder was above the high water mark and would never be flooded. The land owner attempted to enjoin the taking of the remainder (33 acres) on the basis that this land was not required for the project. The Sixth Circuit Court of Appeals dismissed the owner's case. The court said:

"It is well established that the federal government, in eminent domain proceedings, is not limited to

precisely the amount of property which will be physically occupied by the public. Thus, for example, in the construction of a dam and reservoir, as in the instant case, the Government is not restricted to taking the land which will be actually submerged if the additional land can be reasonably related to a public purpose."

In *United States vs. Certain Real Estate, etc.*, 217 Federal Reporter, Second Series 920, the United States appropriated certain land for use as a portion of the site for a new federal office building. The new building in no way covered or even touched the land in question. No governmental agency had any plans for the use or development of the land in question. The land owner tried to enjoin the appropriation. The Sixth Circuit Court of Appeals dismissed the case. The court said at page 924:

"The quantity of property needed and whether the taking of a particular piece of property is necessary are not subject to inquiry by the courts."

Another recent decision is *Berman vs. Parker*, 75 Supreme Court 98, 348 U. S. 26, 99 Lawyers Edition 27. The City of Washington, D. C. appropriated certain real estate for an urban renewal project. The property owner tried to enjoin the appropriation claiming that his land was not needed. The court said at page 104 of 75 Supreme Court:

"It is not for the courts to oversee the choice of the boundary line nor to sit in review on the size of a particular project area. Once the question of the public purpose has been decided, the amount and character of land to be taken for the project and the need for a particular tract to complete the integrated plan rests in the discretion of the legislative branch. * * * It is not for the courts to determine whether it

is necessary for successful consummation of the project that unsafe, unsightly, or insanitary buildings alone be taken or whether title to the land be included, any more than it is the function of the court to sort and choose among the various parcels selected for condemnation.

The rights of these property owners are satisfied when they receive that just compensation which the Fifth Amendment exacts as the price of the taking."

In its brief the Petitioner relies on the case of *Cincinnati vs. Vester,* 281 U. S. 439, 50 Supreme Court 360, 74 Lawyers Edition 950. This case concerns the appropriation of land to widen a city street. In its legislation, for the appropriation, the city failed to state the reason why the land was being taken. The legislation said only that the land was being taken, "in furtherance of the public use." There was no statement defining what was the use. This was not in compliance with the Ohio statute prescribing the procedure for appropriation.

The U. S. Supreme Court decided that the city did not follow the statutory procedure for appropriation. Therefore the attempted taking was invalid. At page 363 of 50 Supreme Court the court said:

"It is an established principle governing the exercise of the jurisdiction of this Court that it will not decide important constitutional questions unnecessarily or hypothetically. The present cases call for the application of this principle. Questions relating to the constitutional validity of an excess condemnation should not be determined upon conjecture as to the contemplated purpose, the object of the excess appropriation not being set forth as required by the local law.

We conclude that the proceedings for excess condemnation of the properties involved in these suits were not taken in conformity with the applicable law

of the state, and in affirming the decrees below upon this ground we refrain from expressing an opinion upon the other questions that have been argued."

The case of *City of East Cleveland vs. Nau,* 124 Ohio State 433, 179 Northeastern 187, cited by the Petitioner, is also a case in which the appropriating agency failed to state correctly the purpose for which the land was being taken. Land was appropriated for a street widening. Actually, as shown by the testimony of the City Engineer, the land was to be taken and used for a park strip. The court ruled that since the purpose of the taking was not correctly stated the attempted appropriation was invalid.

The Petitioner has attempted to apply certain sections of Chapter 163 of the Ohio Revised Code to this case. This Code Chapter is new legislation. It became effective more than ten months after the Respondent's action for appropriation was filed and more than three months after the Common Pleas Court tried this injunction action. To apply this new Code Chapter to existing litigation would give the statutes a retroactive effect. This is prohibited by Article II, Section 28 of the Ohio Constitution and Section 1.20 of the Ohio Revised Code.

CONCLUSION.

We submit to the court that the Petitioner's case does not show any question of great general interest since the law on the subject was decided many years ago. Courts have followed this law ever since. Petitioner has failed to show any constitutional issues in its petition. Therefore the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

DAVID C. GEORGE,
Counsel for Respondent.

APPENDIX.

Ohio Constitution Article II, Section 28.

Section 28 Retroactive Laws.

The general assembly shall have no power to pass retroactive laws, or laws impairing the obligation of contracts; but may, by general laws, authorize courts to carry into effect, upon such terms as shall be just and equitable, the manifest intention of the parties, and officers, by curing omissions, defects and errors, in instruments and proceedings, arising out of their want of conformity with the laws of this state.

Ohio Revised Code Section 1.20.

1.20 Effect of amendment or repeal on pending actions.

When a statute is repealed or amended, such repeal or amendment does not affect pending actions, prosecutions, or proceedings, civil or criminal. When the repeal or amendment relates to the remedy, it does not affect pending actions, prosecutions, or proceedings, unless so expressed, nor does any such repeal or amendment affect causes of such action, prosecution, or proceeding, existing at the time of such amendment or repeal, unless otherwise expressly provided in the amending or repealing act.

Ohio Revised Code Section 719.01.

Any municipal corporation may appropriate, enter upon, and hold real estate within its corporate limits:

(A) For opening, widening, straightening, changing the grade of, and extending streets, and all other public places, and for this purpose, the municipal corporation may appropriate the right of way across railway tracks and lands held by railway companies, where such appro-

priation will not unnecessarily interfere with the reasonable use of such property, and for obtaining material for the improvement of streets and other public places;

(B) For parks, park entrances, boulevards, market places, and children's playgrounds;

(C) For public halls and offices, and for all buildings and structures required for the use of any municipal department;

(D) For prisons, workhouses, houses of refuge and correction, and farm schools;

(E) For hospitals, pesthouses, reformatories, crematories, and cemeteries;

(F) For levees, wharves, and landings;

(G) For bridges, aqueducts, viaducts, and approaches thereto.

(H) For libraries, university sites, and grounds therefor;

(I) For constructing, opening, excavating, improving, or extending any canal or watercourse, located in whole or in part within the limits of the municipal corporation or adjacent and contiguous thereto, and which is not owned in whole or in part by the state, or by a company or individual, authorized by law to make such improvements;

(J) For sewers, drains, ditches, public urinals, bathhouses, water closets, and sewage and garbage disposal plants and farms;

(K) For natural and artificial gas, electric lighting, heating, and power plants, and for supplying the product thereof;

(L) For establishing esplanades, boulevards, parkways, park grounds, and public reservations in, around,

and leading to public buildings, and for the purpose of reselling such land with reservations in the deeds as to the future use of such lands, so as to protect public buildings and their environs, and to preserve the view, appearance, light, air, and usefulness of public grounds occupied by public buildings and esplanades and parkways leading thereto;

(M) For providing a water supply for itself and its inhabitants by the construction of wells, pumps, cisterns, aqueducts, water pipes, dams, reservoirs, reservoir sites, and water works, and for the protection thereof; and to provide for a supply of water for itself and its inhabitants, any municipal corporation may appropriate property within or without its limits; and for such purpose and (any) such municipal corporation may appropriate, in the manner provided in sections 163.01 to 163.22, inclusive of the Revised Code, any property or right or interest therein, previously acquired by any private corporation for any purpose by appropriation proceedings or otherwise, and either party to such appropriation proceedings shall have the same right to change of venue as is given in the trial of civil actions;

(N) For the construction or operation of street, interurban, suburban, or other railways or terminals and the necessary tracks, way stations, depots, terminals, workshops, conduits, elevated structures, subways, tunnels, offices, sidetracks, turnouts, machine shops, bridges, and other appurtenances for the transportation of persons, packages, express matter, freight, and other matter, in, from, into, or through the municipal corporation; and for such purpose any municipal corporation may appropriate any property within or without its corporate limits; and any municipal corporation may appropriate any property,

right, or interest therein previously acquired by any private or public utility corporation for any purpose by appropriate proceedings, as well as the right to cross on, over, or under any street, avenue, alley, way, or public place or part thereof of any other municipal corporation, township, or county;

(O) For establishing airports, landing fields, or other air navigation facilities, either within or without the limits of a municipal corporation for aircraft and transportation terminals, with power to impose restrictions on any part thereof and leasing such part thereof as is desired for purposes associated with or incident to such airports, landing fields, or other air navigation facilities and transportation terminals, including the right to appropriate a right of way for highways, electric, steam, and interurban railroads leading from such airport or landing field to the main highways or the main line of such steam, electric, or interurban railroads, as are desired; all of which are hereby declared to be public purposes.

Division (O) of this section does not authorize a municipal corporation to take or disturb property or facilities belonging to any public utility or to a common carrier engaged in interstate commerce, which property or facilities are required for the proper and convenient operation of such utility or carrier, unless provision is made for the restoration, or duplication of such property or facilities elsewhere, at the sole cost of the municipal corporation.

The powers conferred upon municipal corporations by this section shall be exercised for the purposes and in the manner provided in sections 163.01 to 163.22, inclusive, of the Revised Code.

"Airport," "landing field," and "air navigation facility," as defined in section 4561.01 of the Revised Code, apply to division (O) of this section.